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OCTOBER TERM, 1989

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

JOHN P. CAUSEY, JR., Individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition for certiorari, Pan American World Airways, Inc. ("Pan Am") urges the Court to review two rulings by the court of appeals: one holding that evidence of Pan Am's post-accident remedial measures, which were disclosed in a government report, were properly admitted because Pan Am had not "voluntarily" adopted and implemented those measures; and the second holding that the trial court permissibly informed the jury of the legal effects of its special verdict findings. Plaintiffs-respondents have now submitted their brief

in opposition ("Br."), and this reply is submitted by Pan Am in support of its petition.

I. THE FIRST QUESTION IS PROPERLY PRESENTED BY THIS CASE: WHETHER THE FEDERAL RULES OF EVIDENCE BAR ADMISSION OF A DEFENDANT'S SUBSEQUENT REMEDIAL MEASURES WHEN THOSE MEASURES WERE OR MIGHT HAVE BEEN REQUIRED BY THE GOVERNMENT.

Plaintiffs-respondents do not deny that there is a conflict in the circuits on the issue of whether the Federal Rules of Evidence bar the admission of subsequent remedial measures that were or might have been required by governmental regulation.[1] They do suggest, on a variety of grounds, that the question is not properly presented here and that the evidence involved was "unimportant" in this case. Br. 7. As we now show, these claims are without merit.

First, plaintiffs treat the Hudson report as though it were the subsequent remedial measure and then plaintiffs claim that Rule 407 is not implicated because that report "was researched, authored, and issued by the government," not by Pan Am. Br. 6. Plaintiffs' contention misses the point. The Hudson report described and reported the remedial steps that Pan Am had taken following the accident, including its effort in 1974 to increase retirements of allegedly "substandard" pilots. Pet. App. 72a-73a. Plaintiffs' experts testified about the

[1] Plaintiffs do argue that some of the cases cited in the petition are not squarely in conflict, Br. 7 n.4, but that effort is not persuasive. For instance, the results in cases such as *Lindsay* v. *Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2d Cir. 1980), still conflict with the decision below even though those cases excluded the evidence of a defendant's subsequent remedial measures under Federal Rules of Evidence 403 (undue risk of prejudice or confusion), rather than Rule 407 (explicit exclusion for subsequent remedial measures).

report's description of those subsequent remedial measures by Pan Am, plaintiffs highlighted the measures in cross-examining Pan Am's expert (Br. 11a), and finally, the report was admitted into evidence.[2] In short, even though the Hudson report itself was not a subsequent remedial measure by Pan Am, the facts in the report and the testimony about those facts in the report concerned Pan Am's post-accident measures, and were subject to Rule 407.

Next, plaintiffs present a one-sided summary of the evidence and argue that the admission of Pan Am's post-accident remedial measures was "harmless." Br. 8. That assertion overlooks the facts that the first jury had found for Pan Am on the issue of liability and that this case did not turn on proof of simple negligence. To defeat the Warsaw/Montreal limitations on liability, plaintiffs were required to demonstrate that Pan Am engaged in "wilful misconduct" when it entrusted Flight 812 to Captain Zinke.[3] To meet this heavy burden, they needed all the evidence that they could muster. Plaintiffs' proof of wilful misconduct depended in significant part on evidence showing that there were systemic problems with Pan Am's training and evaluation of pilots; and the Hudson report supported plaintiffs' theory by showing that Pan Am had initiated changes in its pilot training and evaluation systems following the crash and had greatly increased its early retirement of "substandard" pilots.

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[2] Excerpts from the testimony of plaintiffs' experts are reprinted at Pet. App. 102a-105a. The Hudson report itself was not admitted until the close of the trial. Tr. May 30, 1986, at 12-111.

[3] In the trial court's instructions to the jury, wilful misconduct was defined, *inter alia*, as "the conscious performance of an act in such a manner as to imply a conscious disregard of the probable consequences of the performance of the act" or "the intentional omission of an act in a manner implying reckless disregard of the probable consequences." Tr. June 3, 1986, at 16-17.

Plaintiffs also argue that Pan Am's objections were insufficient. That argument is without merit, as the court of appeals implicitly held when it ruled on the merits of Pan Am's objections.[4] Plaintiffs even contend that Pan Am has not shown that the increases in early retirements in 1974 occurred after the Bali crash (Br. 8). The record makes clear, however, that the day *after* the Bali crash a recommendation was made to Pan Am's management that "the retirement system be modified to enable the company to give early retirement" to "weak pilots",[5] and the text of the Hudson report indicates that the increase in retirement commenced after the crash. Pet. App. 73a (Hudson report's reference to the "present program to identify 'weak pilots' "). In fact, plaintiffs' own experts construed the report as showing that the increase in retirements started following the accident.[6]

Plaintiffs argue that the Hudson report was admissible because Rule 407 allows evidence going to the "feasibility of precautionary measures, if controverted." Br. 9. The argument is unavailing because Pan Am did not controvert the feasibility of the remedial measures. It did not contend that its pre-crash pilot training system could not be improved or that "weak pilots" could not be provided with early retirement.[7] Moreover, plaintiffs'

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[4] Pan Am had moved *in limine* to exclude the Hudson report under Rule 407. 3 Exc. Rec. 874-88, 899-900.

[5] The recommendation was in the Thomas report, 1 Exc. Rec. 294, which was dated the day after the accident, Pet. App. 7a.

[6] Pet. App. 102a-105a. Such a construction was necessary to plaintiffs' case. If the retirement of "substandard" pilots had started before the crash, plaintiffs' claim that the entrusting of Flight 812 to Captain Zinke was not an aberration, but was due to systemic failures, would have been undercut.

[7] Plaintiffs' contention (Br. 9) that testimony for Pan Am relating to Captain Zinke's competence opened the door to admission of the Hudson report's descriptions of Pan Am's post-accident remedial measures is both unsubstantiated and wrong.

claim that evidence of post-accident improvements in Pan Am's pilot training system is admissible as impeachment "in the broad sense of the term because Pan Am argued throughout the trial that its system for training pilots was a good one . . ." (Br. 9) is flatly inconsistent with Rule 407. That "rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'" [8] The mere fact that Pan Am's pilot training and evaluation system was capable of improvement following the crash does not "impeach" Pan Am's position that its previous training and evaluation of pilots did not constitute wilful misconduct.[9]

Finally, plaintiffs assert that the issue presented is not of recurring importance.[10] Br. 10-12. As shown in the

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[8] Advisory Committee's Notes to Proposed Federal Rules of Evidence, 56 F.R.D. 183, 226 (1972), quoting *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. (n.s.) 261, 263 (1869) (Bramwell, B.).

[9] The Hudson report does not suggest anything to the contrary. Its principal conclusion was that Pan Am, "in comparison with the air carriers to which the team members are assigned, *is below* the 'state of the art' in air carrier management, training, cockpit procedures, standardization, and adherence to established procedures by airmen." Pet. App. 77a (emphasis in original). In his testimony for Pan Am, Mr. Healy opined that, because the Hudson team members had been primarily drawn from FAA personnel covering American Airlines and United Airlines, the report was comparing Pan Am's programs to programs of those two carriers "who had the two best training facilities in the world." Tr. May 29, 1986, at 11-77 to -78. The fact that Pan Am's programs might not have been the equal of the best programs in the world does not establish that the operation of Pan Am's pre-crash programs constituted wilful misconduct.

[10] Plaintiffs state that some post-accident remedial measures required by the government might be excluded under Rule 403. Br. 10, but this concession does not eliminate the fact that there is a conflict in the circuits on whether such remedial measures are entitled to the broad protection that Rule 407 generally provides to subsequent remedial measures.

petition, however, the admissibility of post-accident remedial measures that were required or might have been required by the government is a question that has arisen and will continue to arise with some frequency, and the question is important to both the regulated entities and the regulatory agencies. Pet. 15-17.[11] In short, the issues raised by Question 1 of Pan Am's petition are important ones warranting this Court's review.[12]

II. WHETHER A DISTRICT COURT ERRS WHEN IT INFORMS THE JURY OF THE LEGAL EFFECTS OF ITS SPECIAL VERDICT FINDINGS IS AN IMPORTANT QUESTION PRESENTED BY THIS CASE.

In Question 2, Pan Am seeks review of the holding that a district court may inform the jury of the legal effects of its findings on special verdict even if such information is not "necessary to enable the jury to make its findings . . . ." Fed. R. Civ. P. 49(a). In their opposition (Br. 13-16), plaintiffs-respondents disagree with the court below that there is a conflict in the circuits as to whether "a district judge abuses his discretion when he informs the jury of the effect of its answers to special verdict interrogatories." Pet. App. 4a. Even if one assumes that plaintiffs are correct in claiming that the *holdings* of the cases might be reconciled in some fashion, the *rationales*

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[11] The contrary policy arguments made by plaintiffs, such as the quote on page 11 of their brief, in effect question whether Rule 407 should have been adopted at all. Congress answered that question when it enacted the Federal Rules of Evidence.

[12] At the conclusion of Part I of their brief, plaintiffs urge that the families of those who died in the crash are entitled to see an end to the case. Br. 12. But Pan Am is also entitled to have the question of whether it should be deprived of the protection of the Warsaw Convention tried in a fair trial. Only these two families have continued to try to attack the applicability of the Warsaw Convention in this air disaster. All of the other cases arising out of the Bali crash were settled years ago.

of the various courts are clearly in conflict, and that conflict will lead to a conflict in trial practice. In those circuits where the rationale conflicts with that of the Ninth Circuit, the trial courts will almost certainly refuse to charge the jury regarding the legal effect of its findings, because they know that to do so would be to invite reversal. On the other hand, district courts in the Ninth Circuit will be free to inform the jury of the legal effect of its finding. Hence, the conflict in the circuits is real.

Plaintiffs also contend (Br. 17-18) that the court of appeals' decision can be upheld on the ground that it was "necessary" to inform the jury about the legal effect of their findings because the jury was asked to decide whether Pan Am had given "adequate" notice of the limitations on liability. This argument necessarily assumes that the question of whether Pan Am gave adequate notice of the limitations was properly in the case. The court of appeals, however, expressly stated that it was not reaching that issue, Pet. App. 9a, probably because that question was then pending before this Court and because the courts in the District of Columbia had held that "adequacy" of notice is not a triable issue under the Warsaw Convention. See *Chan* v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989). *Chan*, of course, was decided after the court of appeals rendered its decision, but our point is that the Ninth Circuit's decision cannot properly be defended on a ground which that court explicitly refused to decide.[13] Hence, plaintiffs are wrong in asserting that the decision below can be upheld on the ground that the notice issue (which should not have been

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[13] If the court of appeals had actually decided that the adequate notice issue had been properly presented to the jury, Pan Am could then have sought certiorari on the ground that the decision below was contrary to *Chan*. And, if the court of appeals had ruled in Pan Am's favor on the issue, it presumably would have reversed.

submitted to the jury at all) made it "necessary" to inform the jury about the legal effects of its special verdict.

Finally, plaintiffs suggest that any error in informing the jury as to the legal effects of its finding was harmless, because even under *Chan*, Pan Am would have had to prove delivery of the decedents' tickets, which contained notices of the Warsaw Convention limitations. Br. 19. That may be true, but if the "adequate" notice issue had not been tried in this case, there would have been no possible need for testimony regarding the text of the notices (Pet. 8-9 & n.21), no possible justification for closing arguments regarding the limitations (Pet. 5-6 n.11,) and no possible need for instruction regarding the limitations (Pet. App. 95a-100a). If the only issue had been delivery of the tickets, Pan Am could have established such delivery by other means than introducing the tickets, such as by answers to requests for admission. Fed. R. Civ. P. 36. It was only because "adequacy" of notice was an issue at trial in this case, that counsel for Pan Am was compelled to introduce copies of the decedents' tickets to show that they contained all required notices of the Warsaw Convention limitations.

CONCLUSION

For the reasons contained in the petition, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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